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91-705

No. 91-

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

KAREN SUE DeBERRY,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED

Are West Virginia's statutory provisions regarding child neglect – W. Va. Code, 61-8D-4(b) and 61-8D-1(6) [1988] – unconstitutionally void for vagueness, in violation of principles of due process, because they do not meet the standard of definiteness required for a criminal offense which is punishable by loss of liberty?

Are West Virginia's statutory provisions regarding child neglect – W. Va. Code, 61-8D-4(b) and 61-8D-1(6) [1988] – unconstitutionally void for vagueness, in violation of principles of due process, because they do not provide either fair notice of impermissible conduct to a person of ordinary intelligence or explicit standards for enforcement?

LIST OF PARTIES

The parties in the Supreme Court of Appeals of West Virginia were the State of West Virginia, Appellant, and Karen Sue DeBerry, Appellee.

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KAREN SUE DeBERRY,
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STATE OF WEST VIRGINIA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner Karen Sue DeBerry respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

CITATIONS TO OPINIONS BELOW

The decision of the Supreme Court of Appeals of West Virginia is reported at 408 S.E.2d 91 (W.Va. 1991), and is set out at pages A-1 -- A-15 of the Appendix. The order entered in the Circuit Court of Harrison County, West Virginia by Judge Daniel L. McCarthy is set out in pages A-16 -- A-19 of the Appendix.

JURISDICTION

The decision of the Supreme Court of Appeals of West Virginia was filed on July 25, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amendment XIV, § 1, Citizenship Rights Not to be Abridged by States, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Code, 61-8D-4(b) [1988], provides:

> (b) If any parent, guardian or custodian shall neglect a child and by such neglect cause said child serious bodily injury, as such term is defined in section one, article eight-b of this chapter, then such parent, guardian or custodian shall be guilty of a

> felony, and, upon conviction thereof, shall be fined not more than three thousand dollars and imprisoned in the penitentiary not less than one nor more than ten years, or both such fine and imprisonment.

W. Va. Code, 61-8D-1(6) [1988], provides:

> (6) "Neglect" means the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health.

STATEMENT OF THE CASE

A. Factual Background

The Harrison County Grand Jury returned a three-count indictment against Defendant/Petitioner Karen Sue DeBerry on January 3, 1990. Count One charged Ms. DeBerry and William Thomas Reaser with the murder of her twelve-year-old daughter, Valerie Dawn Johnson. Count Two of the indictment, which is at issue herein, charged Ms. DeBerry with causing serious bodily injury to her child by felonious neglect, pursuant to W. Va. Code, 61-8D-4(b) [1988]. Count Three of the indictment charged Reaser with aiding and abetting Ms. DeBerry's violation of W. Va. Code, 61-8D-4(b) [1988].

On November 28, 1990, Judge Daniel L. McCarthy entered an Order in the Circuit Court of Harrison County, West Virginia, dismissing an indictment against

Petitioner Karen Sue DeBerry on the grounds that the definition of "neglect" as set forth in Chapter 61, Article 8D, Section 1 of the Code of West Virginia was unconstitutionally void for vagueness.

The circuit court agreed with Defendant Karen Sue DeBerry's contention that the use of the term "neglect" in W. Va. Code, 61-8D-4(b) [1988] is so indefinite and uncertain that it does not inform the accused as to the act or acts necessary to constitute the offense charged with such certainty that the defendant would be able to determine whether or not she had violated the law at the time the alleged offense occurred.

The circuit court case below, therefore, was not decided on the merits of its facts, but rather on the facial inadequacy of the statute.

The Prosecuting Attorney of Harrison County, West Virginia, subsequently filed a Petition for Appeal on Behalf of the State of West Virginia requesting that the Supreme Court of Appeals of West Virginia overrule the decision of the Circuit Court of Harrison County and to uphold the constitutionality of the child neglect statute.

In reversing the judgment of the Circuit Court of Harrison County, the Supreme Court of Appeals of West Virginia held in its July 25, 1991 decision that the term "neglect", as defined by W. Va. Code, 61-8D-1(6), is not unconstitutionally vague in violation of due process principles contained in the United States Constitution, Amendment XIV, § 1, and the West Virginia Constitution, Article III, § 10. The Supreme Court of Appeals of West Virginia further held that W. Va. Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due

process principles contained in the United States Constitution, Amendment XIV, § 1, and the West Virginia Constitution, Article III, § 10, "because such statute's use of the term 'neglect' gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication." App. A-14.

B. When Federal Questions Were Raised

The federal questions sought to be reviewed were first raised on February 13, 1990, when the Defendant/Petitioner Karen Sue DeBerry filed a Motion to Disclose Matters Occurring Before the Grand Jury, App. A-20 -- A-22, and a Motion to Dismiss Indictment. App. A-23 -- A-24.

In the Motion to Disclose Matters Occurring Before the Grand Jury, Defendant DeBerry asserted that the absence of information or evidence on the part of the members of the grand jury which returned the Indictment against her "as to what conduct or lack of conduct on the part of the Defendant constituted a minimum degree of care and as to what conduct or lack of conduct on the part of the Defendant was unreasonable violates minimal due process requirements and subjects the Defendant to prosecution for conduct or lack of conduct without an enunciated standard of criminal responsibility." App. A-21.

Pursuant to her Motion To Dismiss Indictment, Karen Sue DeBerry sought dismissal of the indictment on the grounds that the statutes specified in the Indictment, W. Va. Code, 61-8-4, and by reference W. Va. Code, 61-

8D-1(6), "are unconstitutional on their face and as applied to the defendant, Karen Sue DeBerry, and in addition are unconstitutionally void for vagueness under the Due Process Clause of the Constitution of the United States and the applicable provisions of the Constitution of the State of West Virginia." App. A-23.

As stated above, the Circuit Court of Harrison County, West Virginia, agreed with Defendant DeBerry's due process arguments, and, on November 28, 1990, an order was entered dismissing the indictment, stating that the relevant statutes were unconstitutionally vague. The same federal questions were at issue when the case was considered upon appeal to the Supreme Court of Appeals of West Virginia. That Court, however, reversed the circuit court decision and upheld the constitutionality of the statutes.

Therefore, the federal questions at issue herein were timely and properly raised so as to give the Supreme Court of the United States jurisdiction to review the judgment of the Supreme Court of Appeals of West Virginia on a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The West Virginia Legislature, in 1988, enacted provisions making child neglect resulting in injury a felony. W. Va. Code, 61-8D-4(b), provides as follows:

> (b) If any parent, guardian, or custodian shall neglect a child and by such neglect cause said child serious bodily injury, as such term is defined in section one, article

> eight-b of this chapter, then such parent, guardian or custodian shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than three thousand dollars and imprisoned in the penitentiary not less than one nor more than ten years, or both such fine and imprisonment.

In W. Va. Code, 61-8D-1(6) [1988], the Legislature defined neglect as

> the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety and health.

The Circuit Court of Harrison County, West Virginia, correctly concluded that these provisions are unconstitutionally vague under the due process clauses of the United States and West Virginia constitutions. In other jurisdictions where similar provisions have been upheld, significantly more direction is provided to guide the courts, those who are subject to the provisions, and to the juries that judge them. The Legislature could easily remedy the situation to provide adequate definiteness. Because individual liberty is at issue, a provision which lends itself to arbitrary or uneven application because of vagueness cannot be tolerated. The Petitioner submits that it is imperative that criminal provisions must be sufficiently definite to give notice to those affected thereby and to be explicit standards to those who enforce the law. The petition for certiorari should be granted for the reasons outlined infra.

WEST VIRGINIA'S STATUTORY PROVISIONS REGARDING CHILD NEGLECT -- W. VA. CODE, 61-8D-4(b) and 61-8D-1(6) [1988] -- ARE UNCONSTITUTIONALLY VOID FOR VAGUENESS, IN VIOLATION OF PRINCIPLES OF DUE PROCESS, BECAUSE THEY DO NOT MEET THE STANDARD OF DEFINITENESS FOR A CRIMINAL OFFENSE WHICH IS PUNISHABLE BY LOSS OF LIBERTY.

Although all statutes enjoy a presumption of constitutionality[1], it has long been settled in West Virginia that criminal statutes must be strictly construed against the state and in favor of the liberty of the defendant.[2] The courts may not construe the provisions of a criminal statute on the basis of legislative purpose or intent which is not expressly stated. Even where purpose is clear, courts may not construe criminal provisions in light of purpose to the same extent as they may in other areas of the law.[3]

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[1]State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538, 547 (1974).

[2]E.g., State v. Brumfield, 358 S.E.2d 801, 806 (W.Va. 1987) (citing State v. Wood, 154 W.Va. 397, 175 S.E.2d 482, 490 (1970) (quoting State ex rel. Workman v. Anderson, 89 W.Va. 1, 109 S.E. 782 (1921)); State v. Nichols, 354 S.E.2d 415, 416 (W.Va. 1987); State v. Turley, 350 S.E.2d 696, 699 (W.Va. 1986).

[3]E.g., State v. Brumfield, supra, 358 S.E. 2d at 807 (quoting Myers v. Murensky, 162 W.Va. 5, 245 S.E.2d 920, 922 (1978), overruled on another point, syl. pt. 2, State v. Myers, 298 S.E.2d 813 (W.Va. 1982)); State v. Turley, supra, 350 S.E.2d at 700.

For example, remedial statutes are generally to be liberally construed to effectuate their purposes and are generally considered opposite to penal statutes. 3 N. Singer, Sutherland Statutory Construction § 60.03 (C.Sands 4th ed. 1986). This is so, in part, because the purpose of remedial statutes is an adjustment of the rights of individuals, while the purposes of penal statutes are limited to punishment and perhaps deterrence. See id. A penal statute, as opposed to a remedial statute, may thus be applied only to what is clearly within its letter, not to what may be within its spirit. State v. Turley, supra.

West Virginia's provisions on child neglect appear in two places: first, under the provisions for termination of parental rights in Chapter 49 of the W. Va. Code, which is labeled "Child Welfare," and, second, under the provisions relating to child abuse, in Chapter 61, which is labeled "Crimes and Their Punishment." The first is a remedial statute which is to be liberally construed to effectuate its purpose. The second, by contrast, is a criminal statute which is to be strictly construed within its express terms. In fact, while there is no statement of purpose prefacing Chapter 61, it is clear that its purpose is strictly penal. Therefore, it follows that all doubts must be resolved against the state and in favor of the liberty of the accused – whether on matters of evidentiary proof at trial or on the issue of constitutionality.

As the Supreme Court of Appeals of West Virginia has acknowledged, the constitutional vagueness standard may vary according to whether the statute is regulatory, remedial, or penal. See Hartsock-Flesher Candy v.

Wheeling Wholesale, 328 S.E.2d 144, 152 (W.Va. 1984). As the court stated:

> The vagueness standard may vary depending on the type of statute involved ... [T]he United States Supreme Court discussed this aspect of the vagueness standard, where a licensing ordinance was attacked as vague:
>
> "The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."

Id. at 152-53 (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99, rehearing denied, 456 U.S. 950 (1982) (ellipses indicate full citation of Village of Hoffman). The standard of

definiteness is, thus, higher for statutes that impose a criminal penalty than for other statutes.

> The test of "vagueness" in the context of a statute or regulation designed to punish or discipline, is whether a person of ordinary intelligence is given fair notice that his contemplated conduct is prohibited by such statute or regulation. State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974). This rule reflects the common law and has, by the Supreme Court of the United States, been molded into "a rule of constitutional law, holding that such definiteness is necessary to satisfy the due process requirements of the Fourteenth Amendment." State v. Flinn, supra.

Gooden v. Board of Appeals of West Virginia, 160 W.Va. 318, 234 S.E.2d 893, 896 (1977).

In a criminal prosecution, it is beyond dispute that the state must prove every element of the crime beyond a reasonable doubt.[4] This requires, of necessity, absolute clarity as to the elements of the crime and as to what conduct is within the proscription of the letter of the law. It is simply not possible for a judge to adequately instruct a jury as to the elements of the crime if statutory ambiguity exists as to those very elements. Similarly, it is impossible for a jury to evaluate a

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[4]E.g., State v. Nichols, supra, 354 S.E.2d at 416; State v. Wade, 327 S.E.2d 142, 148 (W.Va. 1985); State v. McCormick, 166 W.Va. 800, 277 S.E.2d 629, 632 (1981).

defendant's conduct on every element of the crime against the reasonable doubt standard of proof if the standard of conduct is itself fluid. Finally, it is not possible for an enforcement officer to know when someone has violated the law if the terms used in the law are ambiguous.

Consequently, a delineation of the elements of the criminal offense is absolutely critical to the vagueness/definiteness issue. In order for a statute to give fair warning, scienter is essential. See, e.g., United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963) (a criminal provision is void for vagueness where an individual would not reasonably understand that contemplated conduct was prohibited). A statute that does not even make clear the basic elements of an offense is fatally deficient in definiteness. A determination of the degree of intent required is similarly essential to the definiteness of that element of the offense for purposes of proof.

Generally, as was the case at common law, criminal intent is an essential element of every crime.[5] This is especially true where the statute makes the offense a felony. United States v. O'Brien, 686 F.2d 850,

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[5]United States v. Parker, 522 F.2d 801, 803 (4th Cir. 1975) (finding that Virginia's legislature clearly intended to incorporate the common-law elements into the criminal statute at issue in the case, including the element of intent, despite the absence of an explicit requirement for intent in the Code); see also State v. Cross, 42 W.Va. 253, 24 S.E. 996 (1896) (presumption of malice arises from proof that killing was willful or intentional, but where jury has reasonable doubt as to whether killing was willful or intentional, it must acquit the accused).

853 (10th Cir. 1982); cf. United States v. Ven-Fuel, Inc., 758 F.2d 741, 759 (1st Cir. 1985) (monetary sanctions will lie for simple negligence, however).

While it is possible for the legislature to impose criminal penalties without an intent requirement, the legislative intent to do so must be express. State v. Great Atlantic & Pacific Tea Co. of America, 111 W.Va. 148, 161 S.E. 5, 5 (1931). Where, as in the instant case, the statute neither imposes an intent requirement nor expressly eliminates it, and the statute is not a codification of the common law, the statute is vague as to its intent requirement. The inherent vagueness of the statute is illustrated by arguments offered by the state in the Court below that the appropriate standard of intent for the criminal offense of neglect is that of ordinary tort negligence. Clearly, the elements of the offense are significantly different if knowledge is required than if mere negligence suffices. The legislature's failure to provide a standard as to intent, without more, renders these provisions impermissibly and unconstitutionally vague.

The offense-defining terms in the instant case consist of the words "neglect caus[ing] ... [a] child serious bodily injury." W. Va. Code, 61-8D-4(b). Neglect is, in turn, defined as the "unreasonable failure ... to exercise a minimum degree of care to assure ... [the] child's physical safety or health." W. Va. Code, 61-8D-1(6). It is the legislature, and only the legislature, which must explicitly define the crime. State v. Wilson, 332 S.E.2d at 807, 810. While the courts have power to evolve common-law principles in areas of law such as tort law, in which the courts have traditionally functioned, the legislature has plenary power to create

and define crimes and penalties. State v. Wilson, supra. In the absence of further express guidance from the legislature, the current provisions on child neglect, if upheld, would thus impermissibly allow the courts to define the elements of the crime of child neglect. See State v. Ballard, 341 So. 2d 957 (Ala. Crim. App. 1976) (finding statute unconstitutionally vague because the court would have to redefine the crime of child abuse in order to resolve ambiguity as to the intent requirement created by difference between title and body of act, thereby impermissibly usurping a purely legislative function).

West Virginia has not expressly imposed, eliminated, or codified any intent requirement for neglect, and that ambiguity in itself renders the neglect provisions unconstitutionally vague.

The lack of clarity as to the intent elements of the crime of neglect, because of the statutory ambiguity, renders it impossible for a judge to adequately instruct a jury as to the elements of this crime. W. Va. Code, 61-8D-4(b) and 61-8D-1(6), are thus, unconstitutionally vague because they do not meet the standard of definiteness required for a criminal statute which imposes the penalty of loss of liberty on proof beyond a reasonable doubt on each element of the crime.

Even if the court were to find that the intent requirement of W. Va. Code, 61-8D-4(b) and 61-8D-1(6), is not vague, however, the statutory terms which define the prohibited conduct of neglect in these provisions are themselves unconstitutionally vague, as argued infra.

WEST VIRGINIA'S STATUTORY PROVISIONS REGARDING CHILD NEGLECT – W. VA. CODE, 61-8D-4(b) and 61-8D-1(6) [1988] -- ARE UNCONSTITUTIONALLY VOID FOR VAGUENESS, IN VIOLATION OF PRINCIPLES OF DUE PROCESS, BECAUSE THEY DO NOT PROVIDE EITHER FAIR NOTICE OF IMPERMISSIBLE CONDUCT TO A PERSON OF ORDINARY INTELLIGENCE OR EXPLICIT STANDARDS FOR ENFORCEMENT.

Statutes must provide sufficient definiteness as to the conduct proscribed to give fair notice to a person of ordinary intelligence and to provide explicit standards for enforcement. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162-63 (1972) (law encouraged arbitrary and erratic arrests and convictions); Giaccio v. State of Pennsylvania, 382 U.S. 399, 402-03 (1966).

In West Virginia, the Supreme Court of Appeals has consistently insisted on explicit standards for conduct prohibited under threat of criminal penalty.[6]

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[6]State v. Harfield, 380 S.E.2d 670, 672 (W.Va. 1988) (meaning of "defile" was well-settled); State v. Less, 294 S.E.2d 62, 66 (W.Va. 1982) (specific offenses were sufficiently definite by reference to the statute or the common law); State v. Reed, 166 W.Va. 558, 276 S.E.2d 313, 316 (W.Va. 1981) (words "sexual gratification" and "sexual desire" were plain and unambiguous on their fact); State v. Flinn, supra, (invalidating as void for vagueness, two of nine definitions in provisions on contributing to the delinquency of a

If an ordinary person, enforcement officer, or jury would have to guess at the meaning of the statutory terms, with the result that the applications of the law would undoubtedly differ, the terms are unconstitutionally vague. United States v. Chatman, 538 F.2d 567, 568 (4th Cir. 1976) (upholding the validity of a provision which might, however, be vague in another context, because of the highly distinctive milieu of prisons).

In Garcelon v. Rutledge, 318 S.E.2d 622, 625 (W.Va. 1984), the Supreme Court of Appeals of West Virginia provided as follows:

> As a matter of basic procedural due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926); see also Gooden v. Board of Appeals of the West Virginia Department of Public Safety, 160 W.Va. 318, 323, 234

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minor: to cause a child to "associate with immoral or vicious persons" and to "deport himself so as to wilfully injure or endanger the morals or health of himself or others"); State v. Grinstead, 157 W.Va. 1001, 206 S.E.2d 912, 918 (1974) (even though term was sufficiently definite, statute was unconstitutional as delegating formulation of standards where another body is left to determine what is or is not an infringement of the law); State v. Lazaro, 157 W.Va. 417, 202 S.E.2d 109, 122-23 (1974) (finding that provision for involuntary hospitalization of those "in need of custody, care or treatment" failed to provide an adequate standard and was subject to abuse).

> S.E.2d 893, 896 (1977); State v. Flinn, 158 W.Va. 111, 117, 208 S.E.2d 538, 542 (1974). There are primarily two reasons for this rule. First, ["] [v]ague laws may trap the innocent by not providing a fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed. 2d 222, 227 (1972). Second, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Grayned, 408 U.S. at 108, 92 S.Ct. at 2299, 33 L.Ed. 2d at 227, see also Papachristou v. City of Jacksonville, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110, 120 (1972).

The term "neglect" in W. Va. Code, 61-8D-4(b), and its definition as the "unreasonable failure ... to exercise a minimum degree of care to assure ... physical safety or health", as provided in W. Va. Code, 61-8D-1(6), are just such terms which would undoubtedly be differently understood and differently applied by different persons, because such persons are required to guess at their meanings. In looking at similar language in the context of termination of parental rights for child neglect, certain courts have found unconstitutional vagueness. For instance, in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the court invalidated a provision which defined "neglected child" as follows:

> Alabama Code, Title 13, § 350, defines a "neglected child" as "any child, who, while under sixteen years of age * * * has not proper parental care or guardianship or whose home, by reason of neglect, cruelty,

> or depravity, on the part of his parent or parents, guardian or other person in whose care he may be, is an unfit or improper place for such child."
> Id. at 778-79.

In Conn, the court found that the terms used had no common meaning and that men and women of ordinary intelligence would disagree greatly according to their differing social, ethical, and religious positions. Id. at 780. It is emphasized that Conn involved a parental termination provision, not a criminal charge. The standard for a criminal provision, such as the one at issue in the instant case, is significantly more demanding, as noted supra.

In Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976), the court found that the standards of "necessary parental care and protection" and of "conduct ... detrimental to the physical or mental health or morals of the child" were susceptible to multifarious meanings." 406 F. Supp. at 18. Again, Alsager involved termination of parental rights, not criminal charges.

As with the above terms, the terms in West Virginia's child neglect provisions have no common meaning and are subject to multifarious meanings. Men and women of ordinary intelligence would greatly disagree concerning the minimal degree of care required to assure physical safety or health according to their differing social positions and according to differences in life's demands upon them.

In a Kansas case, State v. Meinert, 225 Kan. 816, 594 P.2d 232, 234 (1979), the court found a statute defining the crime of endangering a child to be unconstitutionally vague because of the phrase "unjustifiable physical pain." The court in Meinert queried:

> Where is the line to be drawn in determining if discipline or other treatment of a child is justified or unjustified? How does one decide whether or not spanking is due a child and, if so, should it be administered with the hands, a fly swatter, or a belt? Is one slap, two slaps, or five slaps too many? Are two hand slaps a violation of the statute but five very light slaps not? Do red marks lasting only one hour relieve one from prosecution? Some persons do not believe in any form of corporal punishment and to them any such treatment would be unjustified. On the other hand, others may believe any correction, however severe, which produces temporary pain only, and no lasting injury or disfigurement, is justified. The statute could conceivably cover anything form a minor spanking or slapping to severe beating depending upon the personal beliefs of the individual.
> 594 P.2d at 234-35.

Similarly, under the instant statutory provisions for neglect, who is to decide whether there was unreasonable failure to exercise the minimum degree of care to assure physical safety or health? More

importantly, under these provisions, every time that a child's physical safety or health is injured, the minimum degree of care was not exercised, by definition. The parent of every injured or unhealthy child could, therefore, be charged under these provisions and, could arguably be judged by the tort standard of reasonableness. Such a standard is, in fact, not an explicit standard.

A tort standard is simply unacceptable for a criminal offense that can be punished by loss of liberty because a tort standard is fluid and is determined according to the totality of the circumstances. United States v. Durst, 59 F. Supp. 891, 893 (S.D. W.Va. 1945), provided as follows:

> Any statute or regulation purporting to define a crime, and fixing a penalty therefore, which fixes no definite standard by which guilt or innocence can be measured, is in conflict with the constitutional guarantee, and consequently inoperative and void.

An explicit standard and a fluid standard are mutually exclusive concepts. Criminal law demands an explicit standard because constitutional due process guarantees allow nothing less. If there were a tort of "negligent neglect", the fluid reasonable person standard might apply. If the West Virginia provisions should be held to create a criminal offense of "negligent neglect", then criminal, not ordinary negligence, standards would have to apply. As noted, supra, however, the legislature has not indicated its intention to create such an offense.

In State v. Lantz, 90 W.Va. 738, 111 S.E. 766 (1922), the court struck down as unconstitutionally vague a criminal provision requiring an operator to have his vehicle "under control" and to "reduce the speed to a reasonable and proper rate" in negotiating a curve. The court further provided:

> It is a fundamental principle of our jurisprudence that a statute creating a crime must be so certain and definite that one committing an act forbidden can tell, when he does so, that he has violated the law. ... Nobody would know, until after a trial was had and a judgment rendered, what the law was. ... The judgment of each particular jury would be the criterion which would have to be observed, and this judgment cannot be ascertained until after the alleged offense has been committed. ... The court and jury create the offense. They say what shall be necessary to constitute the offense instead of confining their inquiry to whether or not the accused party has done something forbidden by the Legislature. ... And not only is it in effect a delegation to the courts of legislative power, but an attempt to delegate to them power to pass ex post facto laws, because the law governing in particular cases would not be declared, or would not be known, until after the offense was actually committed.
>
> 111 S.E. at 767.

Those jurisdictions which have upheld child neglect or abuse criminal provisions have found sufficient definiteness in one or more of several sources, none of which are present to save the neglect provisions at issue here. To begin, and most important, express provisions on the applicable intent requirement may save otherwise vague terms, as noted in the first section, supra. The West Virginia child neglect provisions, as noted, are fatally defective because they are ambiguous on the intent requirement. In addition to the express provision on the intent requirement, cases have relied on other sources which provide definiteness to otherwise vague terms. None of these, however, saves the instant provisions, particularly in light of the absence of an express intent requirement.

First, common-law meanings which are sufficiently definite have been essentially deemed incorporated into the statute by its reference to the common-law terms. E.g., State v. Brown, 660 S.W.2d 694 (Mo. 1983) ("cruel and inhumane punishment" have a settled common-law meaning); Bowers v. State, 283 Md. 115, 389 A.2d 341 (1978) ("cruel or inhumane" merely codified common-law principles on limits of permissible parental chastisement); cf. State v. Sinica, 220 Neb. 792, 372 N.W.2d 445 (1985) ("cruelly punished" is easily understood as distinguished from the reasonable discipline allowed at common law). The neglect provisions at issue are clearly not a mere codification of the common law, as the statutory definition uses other than common-law terms. This introduces ambiguity as to whether the statute addresses something beyond common-law neglect, in addition to the already inherent ambiguity of the terms themselves.

Second, terms which are commonly understood words of ordinary usage may provide sufficient definiteness. United States v. Morningstar, 456 F.2d 278, 281 (4th Cir. 1972) (simple, well-known words give fair warning); see e.g., Keser v. State, 706 P.2d 263 (Wyo. 1985) ("physical injury" and "mental trauma" are terms of common usage generally understood by the average person); State v. Killory, 73 Wis. 2d 400, 243 N.W.2d 475 (1976) (cruelly, mistreat, and maltreat are all words of common usage about which there is no great dispute as to meaning); State v. Comeaux, 319 So. 2d 897 (La. 1975) ("mistreatment" is in common usage and has s commonly understood meaning).

"Neglect," however, is not such a term because it has no common or fixed meaning -- rather, its meaning varies with the circumstances. State v. Munchmeyer, 156 W.Va. 820, 197 S.E.2d 648, 651 (1973) (parental rights termination). Similarly, "unreasonable" is a term without fixed meaning, as its meaning is determined in light of all the circumstances. Swift & Co. v. Wallace, 105 F.2d 848, 854-55 (7th Cir. 1939) (a trademark case).

Finally, terms which are adequately defined within the statute or by reference to other statutory provisions have been found constitutionally adequate.[7]

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[7]E.g., Faust v. State, 354 So. 2d 866 (Fla. 1978) (other provisions explicitly defined statutory terms, lending clarity); State v. Coe, 92 N.M. 320, 587 P.2d 973 (1978) (statute provided a list of prohibited conduct); Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588, cert. denied, 434 U.S. 906 (1977) (same); State v. Comeaux, supra, (other provision illuminated term).

While W. Va. Code, 61-8D-1(6) [1988], does purport to provide a definition of neglect, the terms used in its definition suffer from vagueness equal to that of the term they supposedly define. Dictionary definitions of the defining terms likewise do not adequately illuminate the terms. Rather they increase the ambiguity and the multifarious meanings of the terms and merely add to the range of disagreement that would be found between persons of ordinary intelligence. In its Brief filed with the Supreme Court of Appeals of West Virginia pursuant to this matter, the State cited Black's Law Dictionary 1379 (5th ed. 1979) for a definition of "unreasonable" as being "[i]rrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid; not reasonable." Clearly, the use of words such as "silly" or "unwise" to define "unreasonable" would make a mockery of the statute.

It is inconceivable that the legislature intended to criminalize silly, or merely unwise, conduct that inadvertently preceded injury to a child. Such a definition does nothing to increase the definiteness of the prohibition or to provide fair notice. Instead, it draws almost every serious injury to any child into the statute's reach and, thereby, draws in the parent, guardian, or voluntary supervisor of the injured child. If anything, the proffered definition would make child neglect a strict-liability criminal offense for the supervising adult, upon serious injury to a child. This, however, the court is not empowered to do, and the legislature has not expressly chosen to do so.

It is simply impossible under the statute as currently written for an individual of ordinary intelligence to know where the line between permissible

and impermissible conduct lies until after an injury has occurred and a legal judgment has been rendered. It is equally impossible under the current provisions for a jury to evaluate a defendant's conduct on every element of the crime against the reasonable doubt standard of proof, because the standard of conduct is itself very fluid. Finally, it is not possible for an enforcement officer to know when someone has violated the law because the terms used in the law are ambiguous and not words whose vagueness is cured by common usage and understanding.

Thus, the neglect provisions at issue fail to provide fair notice of the prohibited conduct by which an individual may avoid liability. They also fail to provide an explicit standard by which the enforcers may judge conduct.

CONCLUSION

While courts are appropriately reluctant to strike down child protection statutes, W. Va. Code, 61-8D-4(b) [1988], is not a protective provision, but rather a penal provision. The invalidation of the current child neglect provisions for unconstitutional vagueness, further, will not encourage child neglect. It will, rather, send a message to the legislature that the provisions must be redrafted in order to provide fair notice to those covered by the statute, explicit standards for those who enforce the statute, express requirements on the elements of the offense for those who represent either the state or individual defendants, and clear guidance for the juries who, finally, pass judgment on guilt or innocence. The Constitutional requirement for due process of law requires at least that much. For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: October 23, 1991

Attorneys for Petitioner

Appendix

APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1991 Term

No. 19990

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellant

v.

KAREN SUE DeBERRY,
Defendant Below, Appellee

Appeal from the Circuit Court of Harrison County
Honorable Daniel L. McCarthy, Judge
Criminal Action No. 90-F-15-1

REVERSED

Submitted: May 14, 1991
Filed: July 25, 1991

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JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. In order to obtain a conviction under W. Va. Code, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by W. Va. Code, 61-8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W. Va. Code, 61-8D-4(b) [1988].

2. "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1, State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974).

3. The term "neglect," as defined by W. Va. Code, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W. Va. Const. art. III, § 10. Therefore, W. Va. Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W. Va. Const. art. III, § 10, because such statute's use of the term "neglect" gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.

McHugh, Justice:

This case is before the Court upon the appeal of the State of West Virginia. The appellee is Karen Sue DeBerry, the defendant below (hereinafter "defendant").

I

This appeal arises from the dismissal of an indictment in the Circuit Court of Harrison County. Because there was no trial, the record is very brief, with little factual development. The State's allegations, however, are as follows: In May, 1989, the defendant went to a party at her neighbor's house and took her twelve-year-old daughter, Valerie, with her. The defendant knew that alcohol would be served at this party.

At the party, the defendant encouraged her daughter to drink alcohol and to play "drinking games"

with adults who were at the party. Valerie consumed alcohol until she lost consciousness.

The defendant apparently arranged for someone else to carry Valerie home and put her in bed, while she (the defendant) engaged in sexual intercourse with another guest at the party.

The next morning, the defendant found Valerie dead in her bedroom. The medical examiner determined that the cause of death was "acute ethanol intoxication" resulting from vast consumption of alcohol.

The defendant was charged in a three-count indictment. The first count charged the defendant and a William Thomas Reaser with first degree murder (by administering poison).[1] The second count charged the defendant with causing serious bodily injury to her child by felonious neglect, pursuant to W. Va. Code, 61-8D-4(b) [1988]. The third count of the indictment charged Reaser with aiding and abetting the defendant's violation of W. Va. Code, 61-8D--4(b) [1988].[2]

The second count of the indictment is at issue in this case, specifically, the constitutionality of W. Va. Code, 61-8D-4(b) [1988], which makes it a felony for a parent, guardian, or custodian to neglect a child, and by such neglect, cause the child serious bodily injury. We must necessarily address the constitutionality of W. Va. Code, 61-8D-1(6) [1988] as well, which sets forth the

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[1]See W.Va. Code, 61-2-1, as amended.

[2]See W.Va. Code, 61-11-6 [1931].

definition of "neglect," as that term is used in W. Va. Code, 61-8D-4(b) [1988].

On February 13, 1990, the defendant moved to dismiss the indictment on the grounds that W. Va. Code, 61-8D-4(b) [1988] is unconstitutionally vague. The circuit court agreed, and, on November 28, 1990, an order was entered dismissing the indictment.[3]

II

W. Va. Code, 61-8D-4 [1988] provides, in pertinent part:

> (b) If any parent, guardian or custodian shall neglect a child and by such neglect

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[3]The hearing on the motion to dismiss was held on November 1, 1990. On November 2, 1990, the State moved to dismiss the first count of the indictment. The defendant opposed the State's motion. The record before this Court does not indicate why the State desired dismissal of the indictment's first count, nor why the defendant would oppose such a motion. However, during the oral argument of this case, counsel for the defendant asserted that the defendant objected to the motion to dismiss because the defendant was prepared to proved that she did not commit murder. In so asserting, counsel for the defendant, during oral argument, stated that the defendant's daughter was murdered, but not by the defendant. Counsel also asserted that the autopsy revealed semen in the victim's vagina, a blood alcohol content of .17%, and that the examining pathologist was not even certified. In any event, the dismissal of the first degree murder count of the indictment has no bearing on the issue that confronts us in this case, specifically, the constitutionality of W.Va. Code, 61-8D-4(b) [1988] and W.Va. Code, 61-8D-1(6) [1988].

> cause said child serious bodily injury, as such term is defined in section one, article eight-b of this chapter, then such parent, guardian or custodian shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than three thousand dollars and imprisoned in the penitentiary not less than one nor more than ten years, or both such fine and imprisonment.

(emphasis supplied)

"'Neglect'" is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." W. Va. Code, 61-8D-1(6) [1988] (emphasis supplied).[4]

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[4]W.Va.Code, 61-8D-4(b) [1988] also refers to the term "serious bodily injury," as that term is defined by W.Va. Code, 61-8D-1(10) [1986], which provides: "'Serious bodily injury' means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."

W.Va. Code, 61-8D-4(a) [1988] is essentially the same as subsection (b), except subsection (a) deals with only "bodily injury," and not "serious bodily injury." The penalties under subsection (a) are less severe as well.

Subsection (c) of W.Va. Code, 61-8D-4 [1988] prohibits application of that section where the neglect is "due primarily to a lack of financial means on the part of" the parent.

In dismissing the indictment, the circuit court held that the definition of the word "neglect," as that term is set forth in W. Va. Code, 61-8D-1(6) [1988] is unconstitutionally void for vagueness, in violation of principles of due process.[5] Thus, the circuit court agreed with the defendant's contention that the use of that term in W. Va. Code, 61-8D-4(b) [1988] is so indefinite and uncertain that it does not inform the accused as to the act or acts necessary to constitute the offense charged with such certainty that the defendant would be able to determine whether or not she had violated the law at the time the alleged offense occurred. We do not agree with the circuit court's judgment in this case, and, accordingly, we reverse the circuit court's order.

Subsection (d) prohibits application to a parent who, due to conflicting tenets and practices of religion, "fails or refuses, or allows another person to fail or refuse, to supply a child under the care, custody or control of such parent, guardian or custodian with necessary medical care[.]"

[5]Due process principles are contained in section 1 of the fourteenth amendment to the United States Constitution, which provides, in part, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[,]" and article III, section 10 of the West Virginia Constitution, which similarly provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

III

In arguing before the lower court that W. Va. Code, 61-8D-4(b) [1988] and W. Va. Code, 61-8D-1(6) [1988] are unconstitutionally vague, the defendant attacked the alleged ambiguity of the terms "unreasonable failure," and "minimum degree of care," as those terms are used in the definition of "neglect." W. Va. Code, 61-8D-1(6) [1988]. The State, on the other hand, asserts that W. Va. Code, 61-8D-4(b) [1988] establishes a standard of ordinary negligence.

In support of its contention, the State points to the definition of the term "unreasonable," which means, inter alia, unwise, senseless, or not rational. Black's Law Dictionary 1379 (5th ed. 1979). The State further looks to the use of term "minimum degree of care," as that term is used in the statutory definition of "neglect." W. Va. Code, 61-8D-1(6) [1988]. "Minimum," the State points out, is the least quantity that is possible or assignable in a particular case. Black's Law Dictionary 898 (5th ed. 1979).

The defendant contends that the State wrongfully equates neglect with negligent, arguing that in a statutory crime, the element of intent may only be dispensed with where the legislature has clearly expressed so in the statute. This Court has held: "The legislative purpose to dispense with the element of intent in a statutory crime must be clearly expressed." Syl., State v. Great Atlantic & Pacific Tea Co. of America, 111 W.Va. 148, 161 S.E. 5 (1931).

The statute at issue in this case does not require intent because it sets forth a standard of neglect.

Although we do not use the words neglect and negligence interchangeably, a comparison to criminal negligence is illustrative of our conclusion that intent is not required to obtain a conviction under W. Va. Code, 61-8D-4(b) [1988]. "There can be no attempt to commit a crime the gravamen of which is negligent conduct. by definition, the actor must intend to commit the target crime. His intent to commit a negligent act would be a contradiction in terms." IV C. Torcia, Wharton's Criminal Law § 741, at 569 (14th ed. 1981) (emphasis supplied).

We agree with the State's contention that W. Va. Code, 61-8D-4(b) [1988] and W. Va. Code, 61-8D-1(6) [1988] are not ambiguous. Clearly, the legislature intended to impose a standard of neglect, as opposed to requiring intent, by enacting W. Va. Code, 61-8D-4(b) [1988]. Because this statute involves neglect in a criminal context, again we view the law of criminal negligence as instructive.

> There can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence. Criminal negligence occurs in those instances in which neither specific nor general criminal intent is present but there exists such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances. Criminal negligence is of a higher degree than is required for civil liability and requires significantly more than ordinary tort negligence.

22 C.J.S. Criminal Law § 38, at 44 (1989) (emphasis supplied) (footnotes omitted). See Eslava v. State, 473 So. 2d 1143, 1147 (Ala. Crim. App.), cert. denied, 473 So. 2d 1143 (Ala. 1985).[6]

Similarly, other states, in their criminal child abuse statutes, include the term "negligence" therein. For example, in State v. Lucero, 87 N.M. 242, 531 P.2d 1215, cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975), the court held that a criminal child abuse statute does not require proof of criminal intent. Rather, as the court

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[6]We note that W.Va.Code, 61-8D-4(b) [1988] does not establish a standard of negligence, such as "reckless disregard," which is contained in this state's vehicular negligent homicide statute, W.Va. Code, 17C-5-1 [1979]. In State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979), we recognized that statute requires more than ordinary negligence. Id. syl. pt. 2.

If W.Va. Code, 61-8D-4(b) [1988] expressed another specific standard of negligence as its standard of criminal liability, then we would be bound to apply that standard. For example, in a similar context, "[w]here a statute adopts degrees of negligence as a basis for fixing criminal responsibility, the court must give effect to them, even though they are not recognized in civil cases." 22 C.J.S. Criminal Law Section 38, at 45 (1989).

Our decision is limited to holding that W. Va. Code, 61-8D-4(b) [1988] requires neglect, which, as defined in W. Va. Code, 61-8D-1(6) [1988], is, fundamentally, of a higher degree than ordinary negligence.

The State maintains that even under a more stringent standard, the defendant's conduct in this case is violative of such a standard. As stated in note 3, supra, our decision in this case does not specifically address the defendant's alleged conduct. Rather, we limit ourselves to deciding the constitutionality of W. Va. Code, 61-8D-4(b) [1988] and W. Va. Code, 61-8D-1(6) [1988].

pointed out, "[t]he Legislature has the authority to make a negligent act a crime as well as an intentional one." 87 N.M. at 245, 531 P.2d at 1218.[7] See also People v. Hoehl, 193 Colo. 557, 568 P.2d 484 (1977); see generally, annotation, Validity and Construction of Penal Statute Prohibiting Child Abuse, 1 A.L.R. 4th 38, § 12[b] (1980 & Supp. 1990).

Accordingly, in order to obtain a conviction under W. Va. Code, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by W. Va. Code, 61-8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health."

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[7]The defendant maintains that the State's reliance upon Lucero is misplaced because in that case, the court was faced with a statute in which the legislature had expressly eliminated the intent requirement by including the term "negligently" in the statute. Lucero is not dispositive of the case now before us. It is, however, persuasive. As stated previously herein, we believe that W.Va. Code, 61-8D-4(b) [1988] does not require intent. The defendant also claims that Lucero is distinguishable from this case because in Lucero, the court addressed a child abuse statute, whereas here, we are reviewing a child neglect statute. We believe that this distinction is inapposite for purposes of our decision in this case. While it is true that abuse refers more to the commission of an act and neglect refers to the omission of an act, the terms "child abuse" and "child neglect" are intertwined in several contexts. See, for example, W.Va. Code, 49-1-3 [1990], which sets forth definitions relating to child abuse and neglect in a civil context. See also State v. Eagle Hawk, 411 N.W.2d 120, 123-24 (S.D. 1987) (agreeing with State's reasoning that, at some point, parental neglect may become abuse of child).

Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W. Va. Code, 61-8D-4(b) [1988].

IV

As for the State's contention that the terms used in the W. Va. Code, 61-8D-4(b) [1988] and W. Va. Code, 61-8D-1(6) [1988] are not unconstitutionally vague, we turn to well established constitutional principles.

In State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974), this Court set forth the requirements for a criminal statute to pass constitutional muster, where that statute is challenged upon the grounds of vagueness. In syllabus point 1 thereto, we held: "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." We have recognized that this "vagueness standard is well settled[.]" State v. Less, ____W.Va.____, _____, 294 S.E. 2d 62, 66 (1981). See syl. pt. 2, Less; syl. pt. 1, State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981); State ex rel. Whitman v. Fox, 160 W.Va. 633, 638-39, 236 S.E.2d 565, 569 (1977); State ex rel. Cogar v. Kidd, 160 W.Va. 371, 376-77, 234 S.E.2d 899, 902 (1977); Anderson v. George, 160 W.Va. 76, 84, 233 S.E.2d 407, 411 (1977) (Miller, J., concurring); State v. Grinstead, 157 W.Va. 1001, 1009, 206 S.E.2d 912, 918 (1974).

This Court is of the opinion that neither W. Va. Code, 61-8D-4(b) [1988], nor W. Va. Code, 61-8D--1(6) [1988] are unconstitutionally vague.

In reaching this conclusion, we look to see whether the criminal statute at issue notifies a potential offender that he or she may be in violation thereof. Although

> [t]here is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions[,] [t]he basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

Syl. pt. 1, State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970).

As pointed out previously herein, the term "unreasonable" means unwise, senseless, or not rational. Black's Law Dictionary 1379 (5th ed. 1979). See also Beerman v. City of Kettering, 14 Ohio Misc. 149, 154, 237 N.E.2d 644, 648 (1965). The statute's use of this term is clear. Furthermore, the "minimum degree of care" is a term which requires little explanation in ascertaining proscribed conduct under the statute at issue.

The definition of "neglect" is comprised of these terms and set forth in W. Va. Code, 61-8D-1(6) [1988].

The term "neglect," in turn, is used in W. Va. Code, 61-8D-4(b) [1988], which makes it a crime to neglect a child where such neglect results in a serious injury.

Clearly, the term "neglect," as that term is used in W. Va. Code, 61-8D-4(b) [1988], and defined in W. Va. Code, 61-8D-4(b) [1988], "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed. 2d 222, 227 (1972). See syl. pt. 1, State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970).

Consistent with the foregoing, we hold that the term "neglect," as defined by W. Va. Code, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W. Va. Const. art. III, § 10. Therefore, W. Va. Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of the due process principles contained in U.S. Const. amend XIV, § 1, and W. Va. Const. art. III, § 10, because such statute's use of the term "neglect" gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.

Accordingly, the judgment of the Circuit Court of Harrison County is reversed.[8]

Reversed.

[8]Our decision in this case is limited to reversing the judgment of the circuit court only with respect to the issue of the constitutionality of the statutes at issue in this case. Our decision does not address the question of the defendant's guilt or innocence, but merely allows the State to reindict the defendant under the applicable statute. See supra note 3.

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS. // FELONY NO. 90-F-15-1

KAREN SUE DeBERRY

ORDER

On the 1st day of November, 1990, came the State of West Virginia by Edmund J. Matko, Prosecuting Attorney for Harrison County, West Virginia, and David A. Jones, Assistant Prosecuting Attorney for Harrison County, West Virginia, and came also the defendant, Karen Sue DeBerry, in person, and by James M. Pool, her counsel, all pursuant to the written Motion of Defendant, Karen Sue DeBerry, to Dismiss Indictment, heretofore filed.

Whereupon defendant, by counsel, moved the Court to dismiss Count No. 2 of the above felony indictment, contending that Count No. 2 was invalid because it was based upon provisions contained in Chapter 61, Article 8D, Section 4 of the Code of West Virginia, as amended, in which the word "neglect" as defined in Chapter 61, Article 8D, Section 1 of said West Virginia Code, as amended, was employed; defendant further contended that the definition of "neglect", as contained in said statute, is so indefinite and uncertain that it does not inform the accused as to the act or acts necessary to constitute the offense charged with such

certainty that the defendant would be able to determine whether or not she had violated the law at the time the alleged offense occurred; that, therefore, the statute under which the defendant was charged is void for vagueness in violation of the Due Process Clause of the United States Constitution and the Constitution of the State of West Virginia.

Thereupon, said motion to dismiss was argued by both counsel for the State and the defendant.

Thereupon, the Court found that the definition of "neglect" as set forth in Chapter 61, Article 8D, Section 1 of the Code of West Virginia, was unconstitutionally void for vagueness, and was of the opinion that said motion to dismiss Count No. 2 of the above styled felony indictment should be sustained.

It was, therefore, ADJUDGED and ORDERED that Count No. 2 of the above styled felony indictment, be, and the same was thereby dismissed, to which the State, by its Prosecuting Attorney, objected and excepted.

Thereupon, the State, by its Prosecuting Attorney, moved the court to dismiss Count No. 1 of the above styled felony indictment without prejudice, which motion was resisted by the defendant, by counsel.

Thereupon, the Court, on its own motion, continued the hearing of this matter until the 2nd day of November, 1990, at 9:00 a.m.

On the 2nd day of November, 1990, came again the State of West Virginia by Edmund J. Matko, Prosecuting Attorney for Harrison County, West Virginia,

and David A. Jones, Assistant Prosecuting Attorney for Harrison County, West Virginia, and cam also the Defendant, Karen Sue DeBerry, in person, and by James M. Pool, her counsel.

Whereupon, the State, by its Assistant Prosecuting Attorney, moved the Court to dismiss Count No. 1 of the above styled felony indictment, with prejudice, which motion was resisted by the defendant, by counsel.

Thereupon, said motion was argued by both counsel for the State and the defendant.

The Court was of the opinion that the State has the right, with the Court's assent, to dismiss indictments of grounds are presented which are sufficient to justify the Court in doing so.

Thereupon, the State, by its Assistant Prosecuting Attorney, presented to the Court its grounds for its motion to dismiss Count No. 1 of the above styled indictment.

After consideration of all of which, the Court was of the opinion that the State had offered sufficient grounds to dismiss Count No. 1 of the above styled felony indictment with prejudice.

It was, therefore, ORDERED that Count No. 1 of the above styled felony indictment be, and the same was thereby dismissed, with prejudice, to which, the defendant, by counsel, duly objected and excepted.

It appearing that said proceedings were recorded fully the official Court Reporter in this case, thereupon,

on motion of the Court, it was further ORDERED that said recording of the official Court Reporter be transcribed, and, when transcribed, be filed as a part of the record in this case and be placed in the official Court file.

ENTER: November 28, 1990
/s/ Daniel L. McCarthy
Judge

SUBMITTED BY:

/s/ Edmund J. Matko
Prosecuting Attorney

/s/ David A. Jones
Assistant Prosecuting Attorney

APPROVED AS TO FORM:
/s/ James M. Pool
Counsel for Defendant

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

vs. // Case No. 90-F-15-1

KAREN SUE DeBERRY,
Defendant.

MOTION TO DISCLOSE MATTERS
OCCURRING BEFORE THE GRAND JURY

Pursuant to Rule 6(e)(3)(C)(ii) of the West Virginia Rules of Criminal Procedure, the Defendant, Karen Sue DeBerry, respectfully moves the court to order disclosure of matters occurring before the grand jury which returned the Indictment against the Defendant, which matters are contained in the minutes of the grand jury proceeding involving the Defendant.

Such disclosure is necessary because the following grounds may exist to dismiss the Indictment returned against the Defendant:

1. The Defendant is charged in the Second Count of the aforesaid Indictment with "unlawfully, intentionally and feloniously neglecting one Valerie Dawn Johnson's physical safety and health and by such neglect causing the said Valerie Dawn Johnson serious bodily injury, in violation of West Virginia Code Section 61-8D-4, as amended."

2. Upon information and belief the Defendant asserts that at no time during the proceedings before the grand jury which returned the Indictment against the Defendant were the members of the grand jury advised by the attorney for the State or provided with any evidence sufficient to return an Indictment against the Defendant with regard to what legal standard was required of or imposed upon the Defendant in order to constitute a minimum degree of care to assure the physical safety and health of said Valerie Dawn Johnson.

3. Upon information and belief the Defendant asserts that at no time during the proceedings before the grand jury which returned the Indictment against the Defendant were the members of the grand jury advised by the attorney for the State or provided with any evidence sufficient to return an Indictment against the Defendant with regard to what conduct or lack of conduct on the part of the Defendant was unreasonable so as to constitute a violation of the statute under which the Defendant was indicted.

4. The absence of information or evidence on the part of the members of the grand jury which returned the Indictment against the Defendant as to what conduct or lack of conduct on the part of the Defendant constituted a minimum degree of care and as to what conduct or lack of conduct on the part of the Defendant was unreasonable violates minimal due process requirements and subjects the Defendant to prosecution for conduct or lack of conduct without an enunciated standard of criminal responsibility.

5. Any Indictment returned alleging the violation of such undefined standards of criminal responsibility is

defective on its face and properly the subject of a Motion To Dismiss.

For the foregoing reasons the Defendant has demonstrated a particularized need to obtain the minutes of the grand jury which indicted the Defendant in order to determine matters occurring before said grand jury which violated the rights of the Defendant under the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Constitution of the State of West Virginia. State v. Louk, 301 S.E.2d 596 (W.Va. 1983.)

Dated this 13th day of February, 1990.

THE DEFENDANT, KAREN SUE DeBERRY
By Counsel.

/s/ James M. Pool
Suite 500, Goff Building
321 West Main Street
Clarksburg, West Virginia 26301
(304) 622-0000

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. // Case No. 90-F-15-1

KAREN SUE DeBERRY

MOTION OF DEFENDANT, KAREN SUE DeBERRY, TO DISMISS INDICTMENT

The defendant, Karen Sue DeBerry, in the above-styled matter respectfully moves the Court, pursuant to Rule 12 of the West Virginia Rules of Criminal Procedure, to dismiss the indictment presented against the defendant by the Grand Jury in the January, 1990 term of court, on the grounds that the statutes specified in the Indictment, W. Va. Code Section 61-8D-4, and by reference W. Va. Code Section 61-8D-1(6), are unconstitutional on their face and as applied to the defendant, Karen Sue DeBerry, and in addition are unconstitutionally void for vagueness under the Due Process Clause of the Constitution of the United States and the applicable provisions of the Constitution of the State of West Virginia.

Dated this 13th day of February, 1990.

THE DEFENDANT, KAREN SUE DeBERRY
By Counsel

/s/ James M. Pool
Suite 500, Goff Building
321 West Main Street
Clarksburg, West Virginia 26301
(304) 622-0000